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ATTORNEYS AT LAW
CANAL SQUARE 1054 THIRTY-FIRST STREET, NW WASHINGTON, DC 20007
TELEPHONE: 202.342.5200 FACSIMILE: 202.342.5219

RICHARD BAIL
BRENDAN COLLINS
STEVEN JOHN FELLMAN
EDWARD D. GREENBERG
KATHARINE FOSTER MEYER
DAVID K. MONROE
TROY A. ROLF
DAVID P. STREET
KEITH G. SWIRSKY
THOMAS W. WILCOX
CHRISTOPHER B. YOUNGER

SVETLANA V. IYUBCHENKO
ROBERT N. KHARASCH

2010 COUNSEL
* NOT ADMITTED IN DC

MINNESOTA OFFICE
700 TWELVE OAKS CENTER DRIVE, SUITE 700
WAYZATA, MN 55391
TELEPHONE 952.449.8817 FACSIMILE 952.449.0614

WRITER & DIRECT E-MAIL ADDRESS
T.WILCOX@GKG.LAW.COM

WRITER & DIRECT DIAL NUMBER
202.342.5235

February 21, 2012

Via E-Filing

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423

Re: *Canexus Chemicals Canada, L.P. v. BNSF Railway Company, STB*
Docket No. NOR 42132

Dear Ms. Brown:

Accompanying this letter for e-filing in the referenced docket on behalf of complainant Canexus Chemicals Canada, L.P. ("Canexus") is a Motion to Strike directed at material contained in BNSF Railway Company's ("BNSF") Opening Evidence that was the subject of the decision served by the Board on February 8, 2012 in this docket.

Please feel free to contact me with any questions.

Sincerely,

Thomas W. Wilcox
Attorney for Canexus Chemicals Canada, L.P.

Enclosure

cc: Counsel for Defendant

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Complainant Canexus Chemicals Canada, L.P. (“Canexus”), pursuant to 49 C.F.R. §1104.8, hereby files this motion to strike all references to BNSF Railway Company’s (“BNSF”) 2011 TIH¹ traffic data in BNSF’s Opening Evidence filed in this proceeding on February 13, 2012. In support of this Motion to Strike, Canexus states the following:

On December 14, 2011, BNSF filed in this proceeding a Motion to Permit Consideration of 2011 TIH Movements from BNSF Traffic Data in Selecting Comparison Group (“Motion”). The Motion asked the Board “to permit the parties to select comparable movements in this Three Benchmark case from BNSF’s 2011 traffic tapes.” Motion at 1. The Motion further stated that it should be granted to allow the parties to select comparable traffic “from . . . BNSF’s 2011 traffic data.” Coupled with BNSF’s position that comparison groups may only be selected from one year of Waybill data, Motion at 13, note 24, the intent and purpose of the Motion was clear and

¹ Toxic Inhalation Hazardous commodities.

unambiguous: to obtain the Board's permission to assemble comparison groups using BNSF's 2011 TIH traffic data in lieu of the 2006-2009 Confidential Waybill Sample provided to the parties pursuant to the Three-Benchmark Rules. Canexus replied in opposition to the Motion in all respects on January 3, 2012.

On February 8, 2012, the Board denied BNSF's Motion in all respects and held that "a discussion of the merits of BNSF's motion will be included in a subsequent decision on the merits." Decision at 2. The Board obviously took this bifurcated approach for the purpose of informing the parties that the BNSF 2011 TIH traffic data that was the subject of the Motion could not be used by either party in their opening evidentiary submissions, which were due on February 13, 2012. Despite the Board's clear and unequivocal denial of its Motion, BNSF has brazenly included in its Opening Evidence the very evidence the Board ruled it could not use, in the form of a "preferred" comparison group based entirely on the BNSF 2011 TIH traffic data. BNSF's justification for including the 2011 TIH traffic data despite the Board's February 8 Decision, set forth at page 4 of BNSF's Opening Evidence, is that the Board somehow did not fully comprehend BNSF's Motion, and that BNSF did not mean that the 2011 data would be the *only* data the parties could use. Rather, Canexus would still be free to use the 2006-2009 data provided to the parties by the Board. Moreover, despite the Board's flat denial of its Motion, BNSF asserts that it is somehow not "clear that the Board intended to preclude any use of 2011 traffic data for purposes of selecting a comparison group" *Id.* at 5.² There was no ambiguity in the purpose of BNSF's Motion, or in Canexus' Reply in opposition, or in the Board's Decision denying the Motion. The Board denied BNSF's request to use 2011 TIH

² BNSF also attempts to imply a quasi reliance justification, stating that it "spent the past several weeks preparing its opening evidence" to include the 2011 TIH traffic data, apparently because it anticipated that the Board would grant its Motion. *Id.* This justification obviously has no merit whatsoever.

traffic data to assemble its comparison groups. BNSF's alleged confusion is contrived, and is simply an attempt to use the Board's election to render a decision on the merits of the Motion at a later date as a pretense to try and force BNSF's TIH 2011 traffic data into the evidentiary record. See also 49 C.F.R. §1103.27(d)("a practitioner shall not offer evidence which he knows the Board should reject, in order to get same before the Board by argument for its admissibility . . .").

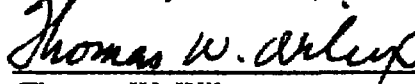
Pursuant to 49 C.F.R. §1104.8, the Board may order that "any redundant, irrelevant, immaterial, impertinent, or scandalous material be stricken from any document." This rule clearly applies in this instance. The 2011 TIH traffic data at issue was determined by the Board, by issuance of its February 8 decision, to be irrelevant, immaterial, as well as inadmissible in this case. Accordingly, all references to this data should be stricken from BNSF's Opening Evidence. The fact that BNSF has included an "alternate" comparison group in its Opening Evidence, that utilizes the Waybill Sample data provided to the parties, in the event "the Board's merits decision makes it clear that the Board intended to preclude any use of the 2011 traffic data for purposes of selecting a comparison group . . . ," Opening Evidence at 5, should not produce a different result. For all the reasons discussed in Canexus' Reply in opposition to the Motion, the 2011 TIH traffic data has no place in this Three Benchmark case, and its continued presence would not only be contrary to the Three Benchmark rules, it would be fundamentally unfair and prejudicial to Canexus. Allowing it to remain in BNSF's Opening Evidence would also enable BNSF to achieve its goal, which was to use the Board's bifurcated approach in denying the Motion as a pretense to insert this rejected material into the evidentiary record.

As for the specific material that should be stricken, Canexus submits that the Board should strike all portions of BNSF's Opening Evidence that include or reference the BNSF 2011

TIH traffic data covered by the Motion. The portions of BNSF's Opening Evidence that Canexus has determined fall into this category are listed in Exhibit 1 to this Motion, for the Board's convenience.

In conclusion, the Board should strike from BNSF's Opening Evidence all references to the 2011 TIH traffic data covered by BNSF's Motion, which the Board denied on February 8, 2012. Moreover, the Board should promptly issue its decision setting forth the substantive reasons for its denial of BNSF's Motion.

Respectfully submitted,



Thomas W. Wilcox

Edward D. Greenberg

Svetlana V. Lyubchenko

GKG Law, P.C.

1054 Thirty-First Street, NW, Suite 200

Washington, DC 20007

Phone: 202-342-5248

Fax: 202-342-5222

*Attorneys for Complainant Canexus Chemicals
Canada, L.P.*

Dated: February 21, 2012

Docket No. 42132
Exhibit 1

**Portions of BNSF Opening Evidence to be Stricken for Including or Discussing BNSF 2011
TIH Traffic Data**

Chapter I, Section A – from the 2nd full paragraph on page 3 through the end of the section on page 7

Chapter I, Section B., Subsection 1

Chapter I, Section B, Subsection 2, page 10 – the first paragraph under “Other Relevant Factors”

Chapter II, Section C, page 18, first full paragraph; pages 21-22

Chapter III, Section A, Subsection 1

Chapter IV, Section A

Chapter V, Section A

Chapter V, Section B introduction, pages 57-58 – Current Rate Adjustment description

Chapter V, Section B introduction, page 59 – references to Current Rate Adjustment in first full paragraph

Chapter V, Section B, Subsection 1, pages 60-64 – Current Rate Adjustment

Verified Statement of Benton V. Fisher (Exhibit 5)

- a. The last sentence on page 2
- b. Chapter III, Section A, pages 6-7
- c. Exhibit No. 6
- d. Exhibit No. 7

BNSF Opening Evidence electronic work papers to strike:

- a. “BNSF 2011 TIH Traffic.CSV”
- b. “BNSF 2011 TIH Traffic File Fields.xlsx”
- c. “Current Rate ORF.xlsx”
- d. “Exhibit 7 Preferred Comparison Group Glendale.pdf”
- e. “Exhibit 8 Preferred Comparison Group Albuquerque.pdf”
- f. “Preferred Comparison Group Albuquerque.xlsx”
- g. “Preferred Comparison Group Glendale.xlsx”
- h. “STB 3B Model – Preferred Case Albuquerque.xlsx”
- i. “STB 3B Model – Preferred Case Glendale.xlsx”

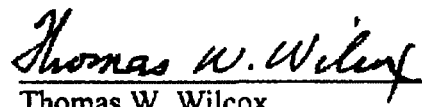
CERTIFICATE OF SERVICE

I do hereby certify that on this 21st day of February, 2012, I have served a copy of the foregoing Motion to Strike by e-mail upon counsel for Defendant at the following address:

Samuel M. Sipe, Jr.
Anthony J. LaRocca
Kathryn Gainey
Steptoe & Johnson LLP
1130 Connecticut Avenue, NW
Washington, DC 20036-1795

and by first-class mail to:

Richard E. Weicher
Jill K. Mulligan
Adam Weiskittel
BNSF Railway Company
2500 Lou Menk Drive
Fort Worth, Texas 76151
(817) 352-2353



Thomas W. Wilcox